

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
ULTIMATE PLACE, LLC.)	
d/b/a ULTIMATE PLACE 2B)	PERMIT NO. RR34-10317
5126 CLINTON DRIVE)	
KOKOMO, INDIANA 46902)	
)	
Permittee.)	

**PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. BACKGROUND OF THE CASE

The Permittee, Ultimate Place, LLC., d/b/a Ultimate Place 2B, 5126 Clinton Drive, Kokomo, Indiana, 46902 (“Permittee”) is the holder of a type 210 Alcohol and Tobacco Commission (“ATC” or “Commission”) Permit, #RR34-10317 (the “Permit”).¹ In December 2005, Permittee filed its request for renewal and that application was assigned to the Howard County Local Board (“Local Board”) for hearing. The Local Board heard the renewal request on February 23, 2006, and on that same day, voted 4 – 0 to recommend denial of the application. The Commission adopted the recommendation of the Local Board on March 7, 2006, and denied the renewal application.

On March 10, 2006, the Permittee filed a timely Notice of Appeal and the matter was assigned to the Commission Hearing Judge, U-Jung Choe (“Hearing Judge”). The Hearing Judge assigned the matter for hearing on December 6, 2006, January 16, 2007, and February 12, 2007, and at those times, witnesses were sworn, evidence was heard, and the matter was taken under advisement. The parties submitted Proposed Findings of Fact and Conclusions of Law for

¹ Beer, wine and liquor (restaurant) located in an incorporated area.

the Hearing Judge's consideration on or before March 31, 2007. The Permittee was represented by attorneys Joseph F. Quill and Mark C. Webb. The intervening remonstrators were attorney Mark A. Hurt, Nancy Hurt, Kevin Smith, Kathy Esslinger and Michael Mitchell. The Hearing Judge took judicial and administrative notices of the entire contents of the file in this matter. Having been duly advised of the facts and law at issue, including, but not limited to, the tape-recorded transcript of the Local Board hearing ("LB Hearing"), the evidence submitted to the Commission during the appeal hearing ("ATC Hearing"), and contents of the entire Commission File ("ATC File"), the Hearing Judge now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE SUBMITTED BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Permittee in this cause:
1. Richard L. Russell, Attorney at Law. Mr. Russell represented Joan and Dan Dumoulin, Sr. (the "Dumoulines"), when they sold the Permit premises to their son, Daniel Dumoulin II ("Dumoulin II"), a year ago. He was first hired by the Dumoulines to represent them in business problems relating to a construction project. He stated the Ultimate Place 2B was not successful as a sports bar. Mr. Russell acknowledged that the Dumoulines entered into an agreement to notify Mike Pickering, a remonstrator, among others, in the event of sale or transfer of the Permit. He stated he complied with that agreement on behalf of the Dumoulines by sending a letter to Attorney Mark McCann by courthouse mailbox on March 14, 2005. He believed McCann when he told him that he did not get the letter but insisted that it was delivered to McCann's box at the courthouse. He stated he also sent a copy of the letter to the Dumoulines. He stated no remonstrators

appeared before the Local Board at the transfer hearing to object to transfer of the Permit from the Dumoulins to Dumoulin II, and he was somewhat surprised.

Mr. Russell stated that Mrs. Dumoulin was present not only because she supports her son, but because she is the contract seller and wants him to have the ability to pay her. The Dumoulins tried to sell the Permit and the bar to someone other than their son and thought they had a buyer, but it did not work out. The Dumoulins thought they would lose a large amount of money until their son told them he would buy it from them. Mr. Russell stated that Dumoulin II's change of the Ultimate Place 2B from a sports bar to adult entertainment in September 2005 was pursuant to existing zoning regulations. He stated that there were no misrepresentations of any kind in the ATC application that was filed with the Commission for the transfer.

Although allegations had been made that the Ultimate Place 2B received excessive police calls for service, Mr. Russell stated there are more calls for service to local schools than to the Ultimate Place 2B. Also, allegations were made that proliferation of adult entertainment increases the number of sex offenders in a community. He believes there is no correlation between the number of sex offenders in the community and the number of adult entertainment establishments.

2. Joan Dumoulin. She and her husband, Daniel Dumoulin, Sr., are the prior owners of the Ultimate Place 2B. Mrs. Dumoulin stated that she acts as a bookkeeper to help her son operate his businesses. During the time she and her husband owned the Ultimate Place 2B, it received no ATC violations. She stated that she is responsible for the February 4, 2006 violation regarding the failure to post the Permit in a conspicuous

location but indicated that the Indiana State Excise Police had been inside the Permit premises on occasions in the past and had not raised any objections.

B. The following evidence was introduced and admitted before the Local Board in favor of the Permittee in this cause:

1. Crime Watch information from the Kokomo Tribune.

C. The following individuals testified before the Local Board against the Applicant in this cause:

1. Russell Ricks, Chief of Kokomo Police Department. Chief Ricks testified that the Ultimate Place 2B has come to the attention of the Kokomo Police Department (“KPD”) on several occasions regarding excessive calls for service. Some of the calls for service were for battery, confiscated property, criminal recklessness with a handgun, fraud, lost property, mischief, theft, trespass, and vehicle theft. Several arrests have also been made at the Ultimate Place 2B for public intoxication, illegal consumption of alcohol, use of an altered driver’s license, battery, minor in a tavern, false informing, resisting law enforcement and disorderly conduct.

Neighboring businesses in close proximity to the Ultimate Place 2B do not have nearly as many calls for service as the Ultimate Place 2B; and do not utilize as many KPD resources as the Ultimate Place 2B. On November 9, 2005, Officer Jeff Packard cited the Permittee for topless dancing without an opaque covering over the nipples. Chief Ricks believes the adult entertainment format of the Ultimate Place 2B attracts patrons that commit the types of crimes described. He stated that the Ultimate Place 2B has good security of its own; therefore, many problems are handled internally and never reported to KPD.

2. Matthew McKillip, Mayor of Kokomo. Mayor McKillip cited Ind. Code § 35-45-4-1 (“[n]udity means...[t]he showing of the female breasts with less than a fully opaque covering or any part of the nipple.”) and other Indiana statutes that apply to regulation of conduct within Permit premises. Mayor McKillip believes that the calls for service relating to Ultimate Place 2B are for serious crimes such as fights, unwelcome guests, loud music and suspicious persons. Mayor McKillip stated that the Dumoulins were not of high and fine reputation within the community and violations and calls for service speak to the character of the Permittee. He reminded the Local Board of the earlier promise by the Dumoulins that they would not operate an adult entertainment establishment at that location. Mayor McKillip stated that the community does not desire these services at this location.

3. David Sink. Mr. Sink resides in Kokomo. There are too many things going on in the government that displease, upset and offend him. Mr. Sink remonstrated because he is standing up for what he believes should be done. The majority should rule in a democratic society. Because the majority of the people at the LB Hearing opposed the renewal of the Permit, the recommendation of the Local Board should reflect such choice by the people.

4. Jim Papchek. Mr. Papchek is a Howard County Councilman, President of the Howard County Planning Commission and an elder in the First Presbyterian Church. He stated that as a Councilman, he had received calls from citizens who live in close proximity to the Ultimate Place 2B stating that they do not want adult entertainment in that location. As a member of the Howard County Planning Commission, Mr. Papcheck was involved in a reworking of the county zoning laws. He acknowledged that these

places need a location to exist, but felt that there were enough of these establishments in the city. He is concerned about the type of patrons that frequent adult entertainment businesses. He felt that Dumoulin II should be bound by the agreement made by the Dumoulins that would restrict adult entertainment at that location.

5. Mark Hurt, attorney. Mr. Hurt is counsel to the Howard County Planning Commission as well as a Deputy Prosecutor for Howard County. He stated that the establishment is operating in violation of Indiana law. Nude dancing is taking place without opaque covering of the breasts. There was a tax protest where taxes were not paid. He stated that the Dumoulins do not have good moral character or good reputation in Kokomo. He stated that in March 2005, the establishment indicated that it was a “family dining and sports bar” and the time of transfer to Dumoulin II, the application, which included the floor plan, still reflected the same. The Commission and remonstrators were not put on notice that the establishment would be changed to an adult entertainment business.

Mr. Hurt stated that since the application did not disclose that the Permit premises would be used for adult entertainment, the Permit was obtained under false pretenses. In any event, it was not until approximately six (6) months after the Permit was transferred from the Dumoulins to their son that the adult entertainment began, and that the floor plan changes were not approved by the Indiana State Excise Police until January, 2006. Therefore, there was a prohibited use of the Permit premises for approximately four (4) months. Mr. Hurt noted that the excise police were at the Permit premises on February 4, 2006 and wrote a violation for public indecency. He claimed that when the tax payments to the state were caught up and the Permit renewed, that the signature on the check was

from Joan Dumoulin, which indicated that someone other than the owner of the Permit was in charge and exercising control over the Permit premises.

6. Kevin Smith, Associate Pastor of Crossroads Community Church. Pastor Smith and his family live near the Permit premises and his church is also located He is at the LB Hearing because of the promises made by Joan Dumoulin four years ago that were not kept. He remonstrated against issuance of the Permit to the Dumoulins in 2001. The Local Board denied the Permit in 2001 because of suspicions that the establishment would be adult entertainment. The Dumoulins made promises that they would never operate adult entertainment at the Ultimate Place 2B when they obtained the Permit. The community does not desire these services at this location. Pastor Smith feels that Joan Dumoulin is still the owner of the business, notwithstanding the current application. The members of his church do not want the establishment being operated in its current format and the renewal of the Permit would have a negative impact on the neighborhood.

7. Vicki Kilmer. Ms. Kilmer is a resident of southern Howard County. She feels that alcoholic beverage Permits are a privilege and not a right. The remonstrators are simply trying to set and uphold a community standard. The Local Board does not have to base its decision solely on violations. Ms. Kilmer stated that the community is against renewal of this Permit, that there is no need for this Permit, and that there are an excessive number of alcoholic beverage Permits in the vicinity of the Ultimate Place 2B.

8. Phil Spencer. Mr. Spencer is the Senior Pastor of Spirit (inaudible) Church. He stated that his church can no longer put guest speakers up in motels in the area of the Permit premises because of excessive police calls. Taking people out to dinner at Cracker Barrel and Texas Roadhouse, both of which are located near the Ultimate Place

2B, has been affected as well. He feels that the restaurants and motels in the area are feeling a loss of business because of his church's decisions not to patronize them because of the presence of the Ultimate Place 2B. He stated that this particular Permit premises is not needed at this location.

9. Unknown speaker².

10. Ted Griffith, Pastor of the First Assembly of God. Pastor Griffith believes adult entertainment establishments, such as the Ultimate Place 2B, damage society by reducing women to objects of lust and by reducing men to the lowest passion. They also damage the businesses and the community as a whole. The excessive police calls for service prevent law enforcement from adequately protecting and caring for others. Pastor Griffith stated that it was an embarrassment to put guests of his church up at the Marriott, which is located in close proximity to the Ultimate Place 2B. Finally, he felt that a business such as the Ultimate Place 2B tarnished the name of Kokomo and that the town did not need that.

11. Vic Sanborn. Mr. Sanborn stated that there is enough trouble in society and that it is difficult to raise children when they are exposed to harmful influences. Children will be affected by establishments like the Ultimate Place 2B as they grow up and parents would be assisted in raising children to be moral and upstanding members of society if the Local Board would deny the renewal of this Permit.

12. Barbara (inaudible)³. She felt that the Permit premise consumes too many police resources. She stated that on the early morning of January 22nd, her house was burglarized and when they called the police, she was told that they were too busy to

² This remonstrator began testifying at a point in the hearing when it was necessary to change the audio tape. A portion of this remonstrator's testimony is not recorded.

³ This remonstrator's last name was not audible on the recording.

respond. She attributes this lack of response to a drain on KPD resources by problem locations. She stated that this Permit needed to be denied in order to give the community back its police resources.

13. Kathy Esslinger. Ms. Esslinger is a minister in town and was present at the Local Board with members of her church. She also helps out with a ministry to homeless persons. Drug and alcohol addictions destroy people's lives. She spoke for a homeless person who was sent back to prison the previous day for various alcohol related offenses and said that if he could have been there at the LB Hearing, he would state that a place such as the Ultimate Place 2B should not have a liquor license.

D. The following evidence was introduced and admitted before the Local Board against the Permittee in this cause:

None.

III. EVIDENCE SUBMITTED BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Permittee in this cause:

1. Dan Dumoulin II. The Dumoulins operated the Ultimate Place 2B as a sports bar and restaurant from 2001 until the time of transfer to their son, Dumoulin II. Dumoulin II testified that he is the owner of the Ultimate Place 2B and is purchasing the real estate on contract. The Permit was transferred from the Dumoulins to Dumoulin II on March 5, 2005. He complied with all of the notice requirements for transfer of the Permit. No remonstrators were present at the transfer hearing before the Local Board on April 28, 2005.

To purchase the Ultimate Place 2B, he took out a loan on his residence to pay off a loan on the Dumoulins' residence and another loan held by the Dumoulins. He also

assumed any other loans outstanding on the Ultimate Place 2B. The Dumoulins did not retain any financial interest in the Ultimate Place 2B after it was transferred to him. The purchase price was Two Million One Hundred Thousand Dollars (\$2,100,000.00) for the real estate and business. He still owes approximately Four Hundred Sixty Thousand Dollars (\$460,000.00). He was denied a loan from the First National Bank of Kokomo in August 2006 because a portion of the security for the loan was assets owned by the Ultimate Place 2B. He does not know if a purchase agreement was drafted by Attorney Russell.

Dumoulin II operated the business as a sports bar and restaurant from March 2005 until September 2005. In September 2005, Dumoulin II changed the format from a sports bar and restaurant to adult entertainment. He complied with all zoning requirements related to adult entertainment businesses. In September 2005, he failed to file a proper change of floor plan with Excise. However, the floor plan was eventually amended and approved by Excise. Prior to the change of format to adult entertainment, he entered into a contract to advertise a sports bar and family dining on a nearby billboard. After the change in format, he let the contract lapse but the owner of the billboard refuses to change the content because he has not been able to lease the billboard to another business.

He believes he has a good personal and business relationship with the businesses in the vicinity of the Ultimate Place, and he has good moral character and good reputation in the community. He has never been convicted of a crime. He was charged with non payment of taxes, but the issue was subsequently resolved. He owns and operates several businesses in Kokomo, Indiana. He has been in business in Kokomo, Indiana since he

was sixteen (16) years old. To his knowledge, none of his employees have ever violated the law. He does not pay payroll taxes on adult entertainment performers. Adult entertainers are compensated as independent contractors. He does pay payroll taxes on some of his security guards and bartenders, but not others. The others are compensated as independent contractors. He has never allowed minors to work in the Ultimate Place 2B. His mother, Joan Dumoulin, serves in a management capacity and has the authority to sign checks on his behalf.

2. Ken Broniak, General Manager. Ken Broniak oversees the day to day operations of the Ultimate Place 2B. The Ultimate Place 2B has adequate security, and personnel checks identification at the entrance. The Ultimate Place 2B does not have extreme security problems. The Ultimate Place is located in a commercial area. There are many businesses in close proximity to the Ultimate Place 2B including the Super 8 Motel, Cracker Barrel, Jalapeno Grill, American General Finance, Texas Roadhouse, Holiday Inn, Collision Cure and Courtyard Marriott. The Ultimate Place 2B does not have more problems than other adult entertainment businesses in Kokomo. As Manager of the Ultimate Place 2B, he seeks to cooperate with Excise and the Commission. The Ultimate Place 2B takes adequate measures to address intoxicated patrons. Mr. Broniak has no personal knowledge of dancers going to hotels after work.

3. Collin MacClaren, Proprietor of Tailgators. Tailgators is a business partially owned by Dumoulin II. Mr. MacClaren was formerly the manager of the Texas Roadhouse. While manager of the Texas Roadhouse, Mr. MacClaren did not believe the Ultimate Place 2B had a negative impact on Texas Roadhouse's business. Mr. MacClaren never had any problems with the Dumoulin's or Dumoulin II. Employees and

managers of the Texas Roadhouse would socialize at the Ultimate Place 2B, and Texas Roadhouse would occasionally sponsor training and parties at the Ultimate Place 2B. Dumoulin II maintained vending machines at the Texas Roadhouse. Dumoulin II has a good work ethic and is honest. Dumoulin II was helpful to the other businesses in the area by loaning tables and chairs if needed and assisted with charitable benefits.

4. Mark Byrd, former Special Deputy for the Howard County Sheriff's Department.

As a Special Deputy, Mr. Byrd occasionally works for Dumoulin II. Dumoulin II was always helpful and cooperative. Mr. Byrd believes Dumoulin II is a hard worker and a good business man. Dumoulin II provides extra income to many people in the community. Mr. Byrd is always paid on time for work performed for Dumoulin II. Mr. Byrd has a granddaughter with Spinal Muscular Atrophy; and, Dumoulin II raised the money to purchase a wheelchair for her.

5. Isaiah Christmas, Security Director for the Ultimate Place 2B. Mr. Christmas has been employed by Dumoulin II for six (6) years. Mr. Christmas is responsible for (i) placement of security personnel in key locations within the bar; (ii) pat searches of incoming patrons; (iii) verifying identification of patrons; (iv) dealing with difficult patrons; (v) diffusing potential problems within the bar; and (vi) arranging transportation for intoxicated patrons. Mr. Christmas is always paid on time by Dumoulin II and is treated well. Mr. Christmas believes Dumoulin II is honest and a good business man. Mr. Christmas believes Dumoulin II is held in high esteem in the community. Mr. Christmas has no knowledge of the Ultimate Place 2B being open to minors.

6. Michael Spear, Real Estate Agent. As a real estate professional, Mr. Spear is familiar with property values in the proximity of the Ultimate Place 2B. Mr. Spear is

qualified as a broker to give appraisals of property values. Property values are not declining in proximity to the Ultimate Place 2B. The assessed property values of businesses in proximity to the Ultimate Place 2B are up roughly fifty percent (50%). Mr. Spear has known the Dumoulin family for twenty (20) years. Mr. Spear is a business partner with Dumoulin II in the Whiskey River Bar and Grill. Dumoulin II has a good work ethic and is an honest person.

7. Joan Dumoulin. The Ultimate Place 2B was intended originally to be a sports bar and grill. The Dumoulins wanted to operate a sports bar because her husband Dan Dumoulin has a background in professional sports. The dance floor was for patrons to dance. The platforms were for tables for people to sit and eat. They had a stage for entertainment such as bands, disc jockeys and karaoke. The Dumoulins made every effort to make the business work as a sports bar and family restaurant. In September 2001, Joan Dumoulin met with Crossroads Church Pastor Jeff Harlow and Pastor Smith, and agreed never to operate an adult entertainment business at the Ultimate Place 2B. The Dumoulins also entered into an agreement with Remonstrator Pickering regarding how the Permit premises would be operated by the Dumoulins. The Dumoulins abided by the terms of that agreement. The Dumoulins never provided adult entertainment at the Ultimate Place 2B while they were operating the business. At the time of the agreement with Mr. Pickering, Joan Dumoulin did not believe future Permit holders would be bound by those terms. During the time the Dumoulins owned the Ultimate Place 2B, the Dumoulins were the ultimate authority to make business decisions, although Dumoulin II acted in an advisory capacity. The Dumoulins received no liquor license violations while they owned the Ultimate Place 2B.

The Dumoulins decided to sell the Ultimate Place 2B because of Joan Dumoulin's poor health and an imminent move to Florida. The Dumoulins were originally contacted about selling the businesses to a micro brewery; however, that deal fell through. Dumoulin II then offered to purchase the business. The Dumoulins directed Attorney Russell to draft the letter required to give notice to Remonstrator Pickering pursuant to the agreement. The Dumoulins were present on March 14th when Attorney Russell drafted the letter notifying Mr. Pickering of the transfer, and received a copy the same day. The letter is dated March 14, 2005. The Dumoulins believed Attorney Russell gave adequate notice of the pending transfer to Remonstrator Pickering. At the time of transfer, the Ultimate Place 2B was operated as a restaurant and sports bar.

Based on a review of KPD Calls for Service, in her opinion, the Ultimate Place 2B is not a problem location. On one occasion, KPD officers were directed to check only the Ultimate Place 2B for topless dancing; but they checked the other topless establishments as well. Both the Dumoulins and Dumoulin II are cooperative with the KPD. None of the remonstrators live in close proximity to the Ultimate Place 2B or are aggrieved or adversely affected by renewal of the alcoholic beverage Permit.

Mayor McKillip received campaign contributions from the owner of the Hip Hugger. The Hip Hugger led the county in alcoholic beverage Permit violations. To her knowledge, the Mayor has not taken the same position with respect to the Hip Hugger. She does not believe the adult entertainment format at the Ultimate Place 2B has a negative impact on surrounding businesses. The Dumoulins did not have the property appraised prior to the sale to Dumoulin II. The Dumoulins wanted what they had in it; but she can't remember how much that was. The Dumoulins assigned all the bills, loans

and taxes to Dumoulin II. Joan Dumoulin acts as bookkeeper for Dumoulin II's businesses and has authority to sign business checks. She writes most of the checks for the businesses. Joan Dumoulin does not know the price Dumoulin II paid for the Ultimate Place 2B.

8. James Lushin, Kokomo Police Officer. Officer James Lushin ("Officer Lushin") is familiar with the Ultimate Place 2B. He has responded when there are large crowds primarily for the purpose of ensuring vehicles exit in a peaceful manner. Officer Lushin does not believe the Ultimate Place 2B is different than another venue with large crowds. Officer Lushin is acquainted with Dumoulin II. Officer Lushin believes Dumoulin II is a responsible bar owner.

9. Brent Wines, Kokomo Police Officer. Officer Brent Wines ("Officer Wines") is familiar with the Ultimate Place 2B. Officer Wines has been acquainted with Dumoulin II for approximately seventeen (17) years. To the best of his knowledge, Dumoulin II's reputation and character are "pretty good." He believes Dumoulin II is held in good esteem in the community. Officer Wines has known Joan Dumoulin for approximately nine (9) years; although, he never actually worked with her.

In his opinion, the Ultimate Place 2B does not consume an "inordinate amount of police resources as compared to other similar establishments." Officer Wines believes Dumoulin II goes farther than most bar owners in checking identification. The Ultimate Place 2B is the only establishment that uses a metal detector at the front door. A "bar check" is not a legitimate call for service. It is a visit to an establishment to have a presence and stop anything before it might start.

10. Lonnie Cook, bartender/cook for the Permittee. Lonnie Cook has known Dumoulin II for approximately eight (8) years; and, worked for him for two (2) years. In addition to his bartender/cook duties, he coordinates picking up the trash in lots surrounded the Ultimate Place 2B.

Lonnie Cook believes Dumoulin II is a smart, hardworking businessman. Dumoulin II is held in high esteem by some members of the community and not by others merely because of the type of business he runs. Dumoulin II treats his employees “awesome.” Dumoulin II goes “above and beyond” to help people. He would help anyone that needs help. Lonnie Cook believes there is nothing wrong with Dumoulin II’s moral character.

11. Vernon Robinson, State Trooper with the Indiana State Police. Officer Vernon Robinson (“Officer Robinson”) is familiar with the Ultimate Place 2B. Officer Robinson has been acquainted with Dumoulin II for approximately ten (10) years. Officer Robinson stated Dumoulin II has always conducted himself in a very professional manner; and, he has never heard anything derogatory about him personally or professionally.

12. Daniel L. Dumoulin, Sr. Dan Dumoulin personally controlled the original floor plan for the Ultimate Place 2B. The agreement with Architect Steven Alexander (“Architect Alexander”) was that he would build a sports bar that Dan Dumoulin designed. A dance floor was envisioned for bands and other types of entertainment. He never suggested to Mr. Alexander that the dance floor was to be used for adult entertainment. The Dumoulins and Architect Alexander parted ways because Architect Alexander’s estimate was not close to the actual charges for the work on the Ultimate

Place 2B. No written agreement exists between the Dumoulins and Dumoulin II for the purchase of the Ultimate Place 2B.

13. Mark Webb, attorney for the Permittee.

14. Joe Quill, attorney for the Permittee.

B. The following evidence was introduced and admitted before the Commission in favor of the Permittee in this cause:

1. Exhibit 1 – Petitions in support of the Ultimate Place;
2. Exhibit 2 – Letters of referral or recommendation to support the Ultimate Place's liquor Permit from members of the community and businesses surrounding the Ultimate Place;
3. Exhibit 3 – *Crime Watch*, Kokomo Tribune;
4. Exhibit 4 – Pleadings related to Board of Zoning appeals regarding Med One's Reflective Chapel's status as a church;
5. Exhibit 5 – Report of Permit Visit and Evaluation from Excise Officer Torres dated November 18, 2005 regarding change in floor plan;
6. Exhibit 6A-B – Map of Howard County, Kokomo indicating distance of remonstrator's from Ultimate Place 2B;
7. Exhibit 7A – *Attorney: McKillip violated state law*, Kokomo Tribune, December 3, 2005;
8. Exhibit 7B – *McKillip tops \$63k in 2005*, Kokomo Tribune, 2006;
9. Exhibit 7C – *Hip Hugger tops in local liquor license violations*, Kokomo Perspective, March 22, 2006;
10. Exhibit 7D – *Ultimate wins its zoning battle*, Kokomo Tribune, July 21, 2006;
11. Exhibit 7E – *Mayor's reaction unwarranted*, Kokomo Tribune, July 23, 2006;

12. Exhibit 7F – *Business owner unsure of future on Markland Avenue*, Kokomo Perspective, November 8, 2006;
13. Exhibit 8 – Report of Commission Public Nuisance violations dated June 1, 2005 to December 19, 2005;
14. Exhibit 10 – Reports of Receipts and Expenditures of a Political Committee for Kokomo Mayor Matt McKillip;
15. Exhibit 11A – Invoice from Holiday Inn Express to advertise in the hotel directory;
16. Exhibit 11B – Invoice from Holiday Inn Express for reservations made for entertainers;
17. Exhibit 12A-R – Photos of areas surrounding around the Ultimate Place;
18. Exhibit 13 – Commercial Tax Records for businesses located in Howard County;
19. Exhibit 14 – Unsigned letter dated October 26, 2001 from Hoosier LLC to (i) Mark McCann; (ii) Kevin Smith; and, (iii) Michael Picking outlining agreement to notify them in the event of a sale or transfer;
20. Exhibit 15 – Unsigned letter dated March 14, 2005 from Richard Russell to Mark McCann notifying him of the pending sale and transfer of the Permit premises;
21. Exhibit 16 – video recording of drive into Kokomo;
22. Exhibit 17 – Undated affidavit of Richard Russell;
23. Exhibit 18 – Affidavit of Jason Tenbrook of the First National Bank of Kokomo dated January 14, 2007;
24. Exhibit 19 – Annual loan statement of Daniel L. Dumoulin II dated January 1, 2006 to December 29, 2006 from First National Bank of Kokomo; and

25. Exhibit 20 – Summary and petitions outlining distance of (i) supporters; and (ii) remonstrators from the Ultimate Place 2B.

C. The following individuals testified before the Commission against the Permittee and in favor of the remonstrators in this cause:

1. Mark McCann, attorney. Mr. McCann represented then-remonstrator Michael Pickering during the 2001 Permit proceedings. At the 2001 ATC Hearing, Joan Dumoulin testified that she did not object to giving notice to the remonstrators prior to transfer or change of format of business of Ultimate Place 2B. Joan Dumoulin also testified that she would commit to never having adult entertainment at the establishment. The Dumoulins entered into a written agreement, which Mr. McCann wrote, to notify Mr. Pickering if (i) the Permit were ever to be transferred; or, (ii) the business was to be converted to adult entertainment. Mr. McCann was notified informally of the transfer by attorney Russell; however, he could not recall if that informal notice was given prior to or after the application for transfer.

Although attorney Russell claims to have given notice of the transfer in writing via courthouse mailbox, Mr. McCann never received that written notice. Mr. McCann was ultimately notified in writing at least a month after the application for transfer. Mr. McCann stated that he was never convinced that the adult entertainment dance floor plans, which showed up in the 2001 drawings, were not a mistake and that he was concerned about Dumoulin II's involvement in the building of the location. He reaffirmed that Michael Pickering, his client back in 2001, did not have any objection to a sports bar and family dining at that location.

2. Steven Alexander, architect. Mr. Alexander is and has been employed with Prince Alexander Architects for twenty-two (22) years. Mr. Alexander was hired in 2000 by the Dumoulins to be the architect for Hoosier, LLC d/b/a the Ultimate Place 2B. He designed plans and drawings for the Ultimate Place 2B. He believed from the beginning the Dumoulins were designing an exotic dance club and that the Ultimate Place 2B was originally intended to be an exotic dance club. He believes that the Dumoulins only changed the format of a business to a restaurant and sports bar after there were problems with obtaining the alcoholic beverage Permit.

The Dumoulins showed him other adult entertainment businesses owned by Dumoulin II, such as Big Daddy's and Little Daddy's, as a prototype for the construction of the Ultimate Place 2B. Specifically, Mr. Alexander was asked to look at problems with the dancers' dressing rooms and dancing facilities at the other bars and to improve those capabilities at the Ultimate Place 2B. He designed a platform for exotic dancers and a green room to be used as a dressing room for performers. In addition, discussions took place between Dumoulin II and Mr. Alexander regarding designing an area for private patrons and lap dancing in the green room; although, this concept was not incorporated into the final plan. The Dumoulins desired a structural design that would accommodate athletic events on the roof and a dance floor at the Ultimate Place 2B. Although the Dumoulins claimed the dance floor was inadvertently left on the drawings due to a computer software problem, Mr. Alexander stated that that is not the case and there was no computer related problem. Mr. Alexander stated that he did not have discussions nor received any approvals from the Dumoulins regarding adult entertainment themes.

The money Mr. Alexander was paid came from Hoosier LLC, not Dumoulin II. Dumoulin II was present more frequently in design meetings than his father. In the course of working on the design, Dumoulin II took Mr. Alexander around to his other establishments to show how the security worked, how the locker rooms functioned and how the kitchen operated. Mr. Alexander believed Dumoulin II was “running the project.” Mr. Alexander conceded there were times when he will work with an owner’s representatives rather than the actual owner of a business. He stopped working on the project before the building was complete because of mutual dissatisfaction between the Dumoulin family and him. To date, the Dumoulins owe him approximately Twelve Thousand Dollars (\$12,000) although he never instituted legal proceedings against them.

3. Matthew McKillip, Mayor of Kokomo. Mayor McKillip attended the ATC Hearing representing himself individually, the citizens of Kokomo and the city council. He appoints a member to the Local Board and appeared before the Local Board in remonstrance. He feels that the Dumoulin family lied to the community. The community objects to adult entertainment on the gateway to the city and the Ultimate Place 2B is located just off of the southern gateway to Kokomo. Mayor McKillip has received frequent calls and comments from various people in opposition to the Ultimate Place 2B. Statistics show that adult entertainment businesses operating for a long period of time cause crime to go up, property values to decline and similar businesses are attracted to the area. In 2004, there were one hundred thirty-six (136) calls for service at the Permit premises. In 2005, there were one hundred twenty-four (124) calls for service. In 2006, there were ninety-one (91) calls for service prior to the LB Hearing. The calls for service

were for serious violations of the law such as rape, battery, fights, auto theft, stabbing, and shots fired.

Mayor McKillip indicated that he is concerned about the other two adult entertainment establishments that Dumoulin II owns, known as Big Daddy's and Little Daddy's. Specifically, he expressed concern for the signs that Dumoulin II is known for putting up which feature the silhouette of a woman. Mayor McKillip does not know Dumoulin II well enough to testify as to his character.

There are problems with trash and litter from the Ultimate Place 2B. Mayor McKillip felt that crime had increased in Ultimate Place 2B since the conversion to adult entertainment format. He is concerned that the presence of the Ultimate Place 2B was hurting property values in that area of town. Mayor McKillip has not directed the KPD to pursue the Ultimate Place 2B with any more vigor than any other problem-causing establishments. He instructed Chief Ricks of the Kokomo Police Department to look at any establishment consuming too many police resources. He conceded that he never remonstrated against any other Permit holder who offered adult entertainment. He did take political donations from the owner of Hip Hugger, another adult entertainment business located in Kokomo.

4. Russell Ricks, Chief, Kokomo Police Department. Chief Ricks believes the Ultimate Place 2B monopolizes too many KPD resources because of the excessive calls for service. At no point did he single out the Ultimate Place 2B for surveillance. He stated the calls for service figures were used for all bars and the standard was the same across the board. If the numbers were inflated for the Ultimate Place 2B, they were inflated for all bars similarly. Chief Ricks stated when he reviewed the calls for service

log, he found a greater than average incidence of “calls for concern” with Ultimate Place 2B, which are potential felonies and have the potential to disrupt the peace and quiet of the neighborhood.

Given the nature of the business, he is not surprised that the Ultimate Place 2B would have more police runs than other types of businesses such as a family style restaurant. Chief Ricks, however, does not dispute Joan Dumoulin’s calculations with regard to actual calls for service at various other locations, and indicated that the police department was changing the way those calls were recorded and calculated. He stated that Joan Dumoulin’s calculation regarding calls for service for the Ultimate Place 2B in 2004 being 39 appears to be correct.

Chief Ricks stated that he sent letters to businesses that he was concerned with over their numbers of calls for service including Ultimate Place 2B. He indicated that he had visited some of the other establishments, but not Ultimate Place 2B, and talked to them on lighting and security issues to help reduce their numbers. Chief Ricks complimented the Ultimate Place 2B on its security, and noted that the calls for service at that location had gone down, which was an improvement. He feels that metal detector and pat-down of patrons is a good public policy to protect not only the patrons, but the Permit premises from harm. To his knowledge, the Ultimate Place 2B is the only one taking these additional safety steps at the present time.

Chief Ricks has not remonstrated against any other adult entertainment establishment in spite of similar numbers for calls for service. He encourages business owners to call when there are problems without fear of reprisal. Chief Ricks also holds an inactive real estate license. In that capacity, he believes the Ultimate Place 2B does

not blend well with the other businesses in that area. He would characterize the other businesses as “family oriented.” From his experience, Chief Ricks believes adult entertainment is not good for property values.

5. Kevin Smith, Associate Pastor, Crossroads Community Church. At the ATC appeal hearing in 2001, the Kokomo community, including him, remonstrated against the issuance of alcoholic beverage Permit because the community believed the establishment was intended to be used for adult entertainment. The Dumoulins denied that establishment would ever be used for adult entertainment. Joan Dumoulin personally visited Pastor Smith at the church and requested that he and his congregation withdraw their remonstrance and promised that there would never be adult entertainment in that building. Joan Dumoulin invited Pastor Smith to tour the building to prove it was not designed for adult entertainment. The Dumoulins sent a letter dated October 19, 2001 promising never to have adult entertainment at that location, and Attorney McCann would be notified if the Permit would ever be transferred. Based on those assurances, the remonstrators signed a statement dropping opposition to the Permit before the Hearing Judge Dan Steiner was able to issue a decision.

In Pastor Smith’s opinion, there was a lack of remonstrance at the transfer hearing because no notice was given to the community. The public vehemently opposes renewal of this Permit. Because of the broken promises, Dumoulin II has forfeited public trust and cannot be judged as a trustworthy business owner.

Pastor Smith conceded that in 2005, attorney McCann was not the attorney representing him or his church. Pastor Smith further conceded that he had no evidence that the Dumoulins had not kept their word with respect to not offering adult

entertainment at the Permit premises while they owned it. Pastor Smith's church has in excess of 1900 people that regularly worship there. 359 people have signed the petition objecting to the transfer of this Permit. Pastor Smith's house is located 3.9 miles away from the Ultimate Place 2B. Pastor Smith is not opposed to the Permit, but rather, the presence of adult entertainment.

6. Jeffrey A. Harlow, Senior Pastor, Crossroads Community Church. Pastor Harlow was present when Joan Dumoulin met with Pastor Smith at the Crossroads Community Church. He heard Joan Dumoulin state that if the remonstrators would "back off," the Dumoulin's would be willing to assure the remonstrators that it would never become an adult entertainment establishment. She indicated they would "lose the family business." The remonstrators relied on that promise. She did not make the promise only on her own behalf but on behalf of her family.

7. Nancy Hurt. Ms. Hurt believes the Dumoulin's and Dumoulin II planned to operate an adult entertainment business from the beginning. Although Ms. Hurt lives closer to the Hip Hugger than the Ultimate Place 2B, she doesn't find it as offensive because the Hip Hugger uses less offensive advertising than Dumoulin II's adult entertainment businesses, Big Daddy's and Little Daddy's, and it is more concealed from plain view than Dumoulin II's businesses. She tried to contact Dumoulin II to complain about his advertising but he did not return her calls. She doesn't believe Dumoulin II is of high reputation and character. At this time, the Ultimate Place 2B is not very visible from US 31; however, she believes more offensive advertising, specifically a sign featuring the silhouette of a woman, which she feels is degrading to women, is imminent.

D. The following evidence was introduced and admitted before the Commission against the Permittee in this cause:

1. Exhibit 1 – Transcript of appeal hearing before Hearing Judge Dan Steiner;
2. Exhibit 2A – Indiana Department of Revenue, Tax Warrant against Dumoulin II, Cause No. 3888046, June 5, 2002 a certified copy of case summary;
3. Exhibit 2B – Howard Circuit Court, Cause No. 34C01-0209-PL-00690, September 5, 2002, Minor v. Parks, et al., case summary printout;
4. Exhibit 2C – Howard Superior Court, Cause No. 34D01-9701-CP-00034, January 22, 1997, Shareese Scott v. Dan Dumoulin, case summary printout;
5. Exhibit 2D – Howard Superior Court III, Cause No. 34D03—1-2-SC-00652, February 9, 2001, Dana Wilson v. Dan Dumoulin, case summary printout;
6. Exhibit 2E – Howard Superior Court III, Cause No. 34D03-0408-SC-02953, August 12, 2004, Douglas Miller v. Dan Dumoulin, a certified copy of case summary printout;
7. Exhibit 2F – Howard Superior Court III, Cause No. 34D03-0110-SC-04087; October 18, 2001, Linda Sullivan v. Dan Dumoulin, a certified copy of case summary;
8. Exhibit 2G – Howard Superior Court III, Cause No. 34D03-9703-SC-00718, March 19, 1997, David Gibbs v. Dan Dumoulin, case summary printout;
9. Exhibit 2H – Howard Superior Court III, Cause No. 34D03-9805-SC-01539, May 22, 1998, Jimmie Brown v. Dan Dumoulin, case summary printout
10. Exhibit 2I – Howard Superior Court III, Cause No. 34D03-9909-SC-03090, September 20, 1999, Mike Decker v. Dan Dumoulin, case summary printout;

11. Exhibit 3 - A copy of Judgment in Hospitality Management Systems, Inc., v. Joan Dumoulin, and Hoosier LLC, d/b/a Ultimate Place 2B, Hamilton Superior Court, Room 4, Cause No. 29D04-0205-CC-000783, December 23, 2004;
12. Exhibit 4 – Anonymous letter addressed to ATC concerning character of Dumoulin family;
13. Exhibit 5 – Approved floor plan converting family dining and sports bar to adult entertainment;
14. Exhibit 6 – Affidavit of Remonstrator Michael Pickering, December 5, 2006;
15. Exhibit 7 – Clearance letter from Department of Revenue with checks signed by Joan Dumoulin;
16. Exhibit 8 – Letter from Joan and Dan Dumoulin, Sr. agreeing never to have adult entertainment at the establishment, dated October 19, 2001;
17. Exhibit 9 – Agreement from Joan and Dan Dumoulin, Sr. never to have adult entertainment at the establishment;
18. Exhibit 10 – Floor plan approved by Excise on January 25, 2002;
19. Exhibit 11 – A copy of ATC approval for the floor plan for adult dancing, December 15, 2005;
20. Exhibit 12 – A hand written note from Joan Dumoulin regarding taking alcoholic beverage Permit for Big Daddy's out of escrow, November 19, 2001;
21. Exhibit 13A to 13R – Photographs of the Ultimate Place 2B;
22. Exhibit 14A – Affidavit of Johnny Harding, Managing Partner, Texas Roadhouse, opposing the Permit renewal of Ultimate Place 2B and stating that Dan Dumoulin II is not a person of good moral character, January 15, 2007;

23. Exhibit 14B - Affidavit of Heather Pugh, Service Manager, Texas Roadhouse, opposing the Permit renewal of Ultimate Place 2B and stating that Dan Dumoulin II is not a person of good moral character, January 15, 2007;
24. Exhibit 14C – Affidavit of Tom Jarulaitis, Owner, Texas Roadhouse, opposing the Permit renewal of Ultimate Place 2B and stating that Dan Dumoulin II is not a person of good moral character, January 15, 2007;
25. Exhibit 15A – *A Report on the Secondary Impacts of Adult Use Businesses in the City of Denver*, Prepared for the Denver City Council, January 1998;
26. Exhibit 15B – *Adult Use Study, Part 4, Summary Findings and Recommendations*, Prepared for Kansas City Missouri, April 1998;
27. Exhibit 15C – *Sexually Oriented Business Study*, Prepared for Rochester, New York, July 2000;
28. Exhibit 15D – *Adult Entertainment Businesses in Indianapolis, An Analysis*, American Planning Association – PAS, 1984;
29. Exhibit 16 – E-mails, police investigations, and court records submitted by Chief Russell Ricks of Kokomo Police Department;
30. Exhibit 17 – Letter from Chief Ricks to the Kokomo/Howard County Plan Commission regarding KPD investigation of nude dancing at the Ultimate Place 2B, November 23, 2005;
31. Exhibit 18 – Petitions opposing renewal of the Ultimate Place 2B Permit;
32. Exhibit 19 – Ultimate Place Community timeline,
33. Exhibit 20A – Petitions opposing renewal of the Permit indicating distance of each petitioner from the Ultimate Place;

34. Exhibit 20B - Petitions opposing renewal of the Permit;
35. Exhibit 20C – Petitions opposing renewal of the Permit; and,
36. Exhibit 20D – Petitions opposing renewal of the Permit.

IV. FINDINGS OF FACT

1. The Permittee is the holder of a Type 210 ATC Permit, which was first issued in December, 2001. (ATC File).
2. On March 17, 2005, the Permittee filed an Application for New or Transfer Permit with the Commission, upon which he described the business qualifying him for the Permit as “sports bar & grill.” (ATC File).
3. On April 28, 2005, the Commission approved the transfer of the Permit. (ATC Records).
4. In September, 2005, the Permittee ceased operating the Permit premises as a sports bar and grill and began operating it as an adult entertainment location. (Local Board Hearing, ATC Hearing).
5. On December 8, 2005, the Permittee filed an application for renewal of the Permit. (ATC File).
6. On February 23, 2006, the Local Board held a hearing and voted four (4) to zero (0) to recommend denial of the renewal. (ATC File).
7. On March 7, 2006, the Commission voted to adopt the Local Board’s recommendation to deny renewal of the Permit. (ATC File).
8. On March 10, 2006, the Permittee filed a timely Notice of Appeal. (ATC File).
9. The Permit premises was opened in 2001 as Hoosier, LLC, d/b/a the Ultimate Place 2B, a sports bar, and was initially operated by the Dumoulins, who are the owners of

Hoosier, LLC and the parents of Dumoulin II, who owns Ultimate Place, LLC. (LB Hearing; ATC Hearing).

10. Dumoulin II owns adult entertainment businesses in Kokomo known as Big Daddy's and Little Daddy's. (ATC Hearing).

11. Hoosier, LLC hired architect Steven Alexander to design the Ultimate Place 2B with features consistent with an adult entertainment establishment, including raised dance platforms and a dressing room for performers. (ATC Hearing).

12. While the Ultimate Place 2B was being constructed, Dumoulin II worked with architect Steven Alexander to design the interior of the premises. (ATC Hearing).

13. Mr. Alexander was instructed to review the layout of other adult entertainment businesses owned by Dumoulin II as a prototype for the construction of the Ultimate Place 2B. (ATC Hearing).

14. When Hoosier, LLC applied for its Permit in 2001, remonstrators objected based on a desire that there not be adult entertainment at the Permit premises. (LB Hearing; ATC Hearing).

15. After the structure was completed, an agreement was reached in 2001 by which the remonstrators agreed to withdraw their remonstrance and allow for the present Permit to be issued to the Dumoulins in exchange for the Dumoulins' agreement never to allow the Permit premises to become an adult entertainment business. (LB Hearing; ATC Hearing).

16. Hoosier, LLC owned the Permit premises from the time it opened until the Commission transferred the Permit to Ultimate Place, LLC, on or about April 28, 2005. (ATC File).

17. During the time that Hoosier LLC owned and operated the Permit premises, no topless dancing or adult entertainment of any kind was offered on the Permit premises. (ATC Hearing).

18. Dumoulin II had no ownership interest of any kind in Hoosier, LLC, d/b/a the Ultimate Place 2B from the time it opened in 2001 until the Permit was transferred to him in April, 2005. (ATC Hearing).

19. Dumoulin II had no involvement of any kind in the operation or management of Hoosier, LLC, d/b/a the Ultimate Place 2B from the time it opened in 2001 until the Permit was transferred to him in April, 2005. (ATC Hearing).

20. The 2001 agreement further provided in part as follows: "If the majority ownership of the Permit premises is going to change or be transferred, Hoosier LLC will immediately notify Mark A. McCann, Esq. in writing. (Permittee's Exhibit 14, ATC Hearing).

21. The Dumoulins, acting on behalf of Hoosier, LLC, engaged attorney Russell to represent them in the sale of the Ultimate Place 2B from them to their son, Dumoulin II. (LB Hearing; ATC Hearing).

22. In the course of the sale from Hoosier LLC to Ultimate Place, LLC, attorney Russell spoke with attorney McCann and after informing him that Hoosier LLC intended to sell the Permit, asked McCann how he wanted notice to be given to him. (LB Hearing).

23. In the course of that discussion, attorney McCann asked attorney Russell to put the notice of intent to sell the Permit premises in a letter and to send it to him. (LB Hearing).

24. McCann did not receive notice of the Dumoulins' intent to sell the Permit premises until more than a month after the transfer application was filed. (ATC Hearing).

25. Attorney McCann was not actively representing any remonstrator at the time that attorney Russell sent the March 14, 2005 letter to him. (LB Hearing; ATC Hearing).

26. The Permit was transferred from Hoosier LLC to Ultimate Place LLC on or about April 28, 2005, with no remonstrators having protested the transfer. (ATC File).

27. At the time of the transfer application, the Permit premises was being operated as a sports bar and family restaurant. (ATC Hearing).

28. Dumoulin II claims the purchase of the Ultimate Place 2B by from his parents was a *bona fide* purchase for value and was not a sham transaction; however, neither he nor his parents ever produced any written sale agreement, deed transferring ownership of the real estate, property tax receipts, tax returns, or other written evidence of the transaction, despite requests from the Hearing Judge for the same. Joan Dumoulin testified that she cannot recall the price Dumoulin II supposedly paid for the Ultimate Place 2B. Dan Dumoulin, Sr. testified that no written agreement exists for the sale of the Ultimate Place 2B. (ATC Hearing).

29. The Permit premises began offering adult entertainment in early September, 2005. (ATC Hearing).

30. The character of the business conducted at the Permit premises has changed from a sports bar and grill to an adult entertainment business. (LB Hearing, ATC Hearing).

31. On November 9, 2005, Officer Jeff Packard of the Kokomo Police cited the Permittee for topless dancing without an opaque covering over the nipples in violation of IC 35-45-4-1. (LB Hearing).

32. On February 4, 2006, the Ultimate Place 2B was cited for Permitting nude dancers to perform without an opaque covering over their nipples in violation of IC 35-45-4-1

and 905 IAC 1-16.1-3; and for failing to display its Permit in violation of IC 7.1-3-1-20. Both violations were settled by the Permittee. (ATC File).

33. Dumoulin II is not a person of strict integrity and is not held in high esteem in the community in which the Permit premises is located. (LB Hearing, ATC Hearing).

34. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2; Ind. Code § 7.1-2-3-9.

2. The Permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission, including a public hearing and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. The Permittee is the holder of a type 210 ATC Permit, #RR34-10317. (ATC File).

8. Said Permit was first issued in December 2001, and has been annually renewed thereafter. (ATC File).

9. The Commission has absolute discretion to grant or refuse a Permit application as it deems the public interest will be served best. Ind. Code §§ 7.1-3-19-1, -10.

10. The Commission is required to follow the recommendation of the local board when the local board votes to deny an application by a majority vote, unless the recommendation is arbitrary, capricious, contrary to a constitutional right, outside statutory jurisdiction, without observance of required procedures, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11. *Indiana Alcoholic Beverage Commission v. Harmon*, 379 N.E.2d 140, 147 (Ind. 1978).

11. A renewal application may be denied for any one of the following reasons: (1) The Permittee does not maintain a high and fine reputation, and is not of good moral character and good repute in the community; (2) The Permittee has allowed the licensed premises to become a public nuisance, or the scene of acts or conduct which are prohibited by the criminal laws of Indiana or the United States; (3) The Permittee violates or refuses to comply with a provision or a rule or regulation of the Commission; (4) The Permittee has ceased to possess any of the qualifications, including alteration or cessation of the particular business or type of business then engaged in, which qualifies him to hold that particular type of Permit; or (5) The applicant has not fully disclosed the true facts in respect to the location of the Permit premises for which the Permit is applied. 905 IAC 1-27-1, -2, -3.

12. In determining whether an applicant for renewal of a Permit is of good moral character good repute in the community, the Commission must consider whether the acts or conduct of the applicant would constitute actions or conduct prohibited by the Indiana Penal Code or criminal offenses under the laws of the Unites States. 905 IAC 1-27-1. The

Commission may also consider the esteem in which the person is held by members of his community, and such assessment of his character as may reasonably be inferred from police reports, evidence admitted in court and commission proceedings, information contained in public records and other sources of information as Permitted by Ind. Code § 7.1-3-19-18 and Ind. Code § 7.1-3-19-10. *Id.*

13. The Commission may refuse to renew a Permit if the owner, manager, or management of the establishment is not a person of strict integrity and high repute in the community. Ind. Code § 7.1-3-9-10.

14. The commission may void a Permit issued upon an application not fully disclosing the true facts in respect to the location of the premises for which the Permit applied for is to be applicable. Ind. Code § 7.1-3-23-13.

15. The Permittee contends the LB's decision not to renew the Permit was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence.

16. An administrative agency action is arbitrary and capricious "only where there is no reasonable basis for the action." *Ind. Civil Rights Comm'n v. Delaware County Cir. Ct.*, 668 N.E.2d 1219, 1221 (Ind. 1996). An arbitrary and capricious decision is "patently unreasonable," and "lacks any basis which might lead a reasonable person to the same conclusion." *City of Indianapolis v. Woods*, 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998). The burden of proving that the administrative action in question was arbitrary or capricious falls on the party attempting to reverse the decision. *Forrest v. Sch. City of Hobart*, 498 N.E.2d 14, 17 (Ind. Ct. App. 1986).

17. Substantial evidence is the standard to be applied by the Commission in review of the record of proceedings. Substantial evidence requires something more than a scintilla, and less than a preponderance of evidence; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Indiana Alcoholic Beverage Comm. v. River Road Lounge*, 590 N.E. 2d 656, 659 (Ind. App. 1992); see also *Roberts v. County of Allen*, 773 N.E.2d 850, 853 (Ind. App. 2002).

18. The Local Board clearly has the constitutional right and statutory authority to issue or deny a Permit. Likewise, the Local Board followed the procedure required by law in the denial of the Permit. (LB Hearing, ATC Hearing, ATC File).

19. The decision of the Local Board to deny the Permit was based upon substantial evidence and was neither arbitrary nor capricious. The Local Board heard testimony and reviewed petitions submitted by the Applicant and Remonstrators regarding the community's opinion of the integrity and moral character of the Applicant. The record is clear that the Permit was only granted in consideration of the Dumoulin's promise that the Permit premises would never become an adult entertainment business. Further, the type of business for which the transfer from Hoosier, LLC to Ultimate Place, LLC, was granted was to be a sports bar and grill, not an adult entertainment business. Consequently, a number of bases existed upon which the Local Board could properly deny the Permit, including the Permittee's moral character, the complete change in the nature of business from a family sports bar to an adult entertainment business, and the Permittee's apparent intention to convert the Permit premises to an adult entertainment business shortly after transfer of the Permit to his limited liability company. Clearly, the Local Board considered the evidence before it and based its decision on that evidence. (Local Board Hearing, ATC Hearing, ATC File).

20. Based on the entire record, the Local Board's decision to deny the Permittee's Permit is based on reasonable and sound evidentiary support, and is, therefore, supported by substantial evidence. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.* 615 N.E.2d 100, 104 (Ind. App. 1993).

21. The Commission's denial of the Permit application on March 7, 2006, was based upon the recommendation of the Local Board, and was based upon substantive and substantial evidence.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the recommendation of the Local Board to deny the renewal application of the Ultimate Place, LLC, d/b/a Ultimate Place 2B, 5126 Clinton Drive, Kokomo, Indiana 46902, Permit No. RR34-10317, in this matter was based on substantial evidence and must be sustained. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was insufficient to rule in favor of the Permittee and against the recommendation of the Local Board. The appeal of Permittee is denied, the recommendation of the Local Board in this matter is sustained and the Permit renewal applied for herein is hereby DENIED.

DATED: May 31, 2007

U-Jung Choe
Hearing Judge
Alcohol and Tobacco Commission